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IN THE  
**Supreme Court of the United States**  
October Term, 1971

**No. 71-308**

UNITED STATES OF AMERICA,  
Petitioner.

v.

MARIAN A. BYRUM, EXECUTRIX UNDER THE  
LAST WILL AND TESTAMENT OF  
MILLIKEN C. BYRUM, DECEASED

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**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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It is the position of respondent that the petition for a writ of certiorari should be denied for the reason that this case was correctly decided by the Court of Appeals, and for the further reason that it is not a case of great public concern.

**QUESTION PRESENTED**

Did the retention of voting rights in stock transferred by decedent during his lifetime require the inclusion of the stock in his taxable estate under Section 2036 of the Internal Revenue Code of 1954.

## COUNTER-STATEMENT

The decedent, during his lifetime, created an irrevocable trust for the benefit of his children, naming a national banking corporation as trustee. The trust agreement provided that during his lifetime "all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime." (R. 25) There was included in the corpus of the trust unlisted voting stock in three corporations. The right to vote the stock transferred to the trust coupled with the vote from stock held by decedent gave him a majority vote in each of the three corporations. From the time of the creation of the trust until decedent's death, there were minority stockholders in each of the corporations. (R. 46, 47 and 48).

The corpus of the trust included other assets in addition to the unlisted stock. (R. 35-45).

No distributions of income or principal were made by the corporate trustee during decedent's lifetime. (R. 35).

## REASONS FOR DENIAL OF WRIT

1. Contrary to the tenor of the petition for a writ of certiorari, this is not a case of the applicability of the federal estate tax law to a new tax avoidance device. It represents, instead, a bid by the Internal Revenue Service to tax a kind of *inter vivos* transfer heretofore considered, in the Sixth Circuit at least, to be excluded from the federal estate tax. The transfer allows the making of a gift of stock in a small business corporation without threat to the business well-being of the corporation.

Despite, however, this rather broad classification of the transfer involved, it is unlikely that the decision of the Court of Appeals will extend beyond the particular

facts of this case. The combination of circumstances present in this case gives the decision a considerably narrower effect than is contended for by petitioner. There is no indication that this question has arisen in other circuits or reason to believe that it will arise. And it should be apparent that the "surge of litigation"<sup>1</sup> which is seen as a result of this decision could be largely eliminated by petitioner's acceptance of the well reasoned decision of the Court of Appeals as precedent.

2. Admittedly, the cases hold that a grantor's retained power either to distribute or to accumulate trust income constitutes a power to "designate" within the meaning of Section 2036 (a) (2). But this is not *Byrum*. The power to accumulate or distribute income from the Byrum trust belonged to the corporate trustee alone.

Nor is there force to the argument that the decedent's majority vote gave him the power to control the dividend policies of the corporations which, in turn, gave him the power to regulate the flow of dividend income to the trust which, in turn, gave him the power, indirectly, to distribute or accumulate the income from the trust. The existence of minority stock interests precluded decedent from regulating, through his voting majority, the income to the trust by manipulating the payment of dividends to serve his personal interests. Under Ohio law he, and the directors of the corporations, stood in a position of trust as to the minority stockholders. *Selama-Dindings Plantations, Ltd. v. Durham*, 216 F. Supp. 104 (S. D. Ohio W.D. 1963) aff'd 337 F. 2d 949; *State v. Witmore*, 126 Ohio St. 381, 185 N.E. 547 (1923); *Thomas v. Matthews*, 94 Ohio St. 32, 113 N.E. 669 (1916).

The comparison by petitioner of the discretion of corporate directors (elected by majority voting interests) either to declare dividends or to reinvest earnings in the

1. This consequence is predicted at page 7 of the petition for a writ of certiorari.



business with the power of a trustee in his sole discretion to accumulate or distribute income is not valid. The discretion of corporate directors is measured as against the right of stockholders to dividends,<sup>2</sup> while the discretion of the trustee to distribute or accumulate is by the terms of the grant unfettered.

In addition, under the peculiar facts of this case, there were other income producing assets in the Byrum trust from which the corporate trustee could have paid income had it determined, in its sole discretion, to distribute income.

3. Undoubtedly, the most valuable property attribute of stocks is their income. *Commissioner v. Estate of Church*, 335 U.S. 632, 644 (1949). Both the income from and the legal title to the stocks in question were irrevocably transferred by the decedent during his lifetime. The retained power to vote the stock did not give to decedent a substantial present economic benefit in the property transferred requiring its inclusion in decedent's estate under Section 2036 (a) (1). Cf. *Lober v. United States*, 346 U.S. 335 (1953); *Commissioner v. Estate of Holmes*, 326 U.S. 480 (1948).

The "right to control" argument is not persuasive. Assuming, *arguendo*, that petitioner correctly portrays the potential for corporate control existing through the vote of this stock,<sup>3</sup> it is apparent that the economic benefit to be had by decedent therefrom, was, at most, an indirect pecuniary benefit, coming not so much from the property

2. *Wilberding v. Miller*, 90 Ohio St. 28, 42 (1914); *Arbuckle v. Woolson Spice Co.*, 21 O.C.C. 356 (1901).

3. Section 1701.56, Revised Code of Ohio, requires that there be not less than three directors, who stand in a fiduciary relationship to the corporation and to minority stockholders. *Selama-Dindings Plantations, Ltd. v. Durham*, 216 F. Supp. 104 (S. D. Ohio W.D. 1963) aff'd 337 F.2d 949; *State v. Witmore*, 126 Ohio St. 381, 391, 185 N.E. 547 (1923); *Thomas v. Matthews*, 94 Ohio St. 32, 43, 113 N.E. 669 (1916). Section 1701.69, Revised Code of Ohio, provides that directors shall fix the compensation of officers, unless otherwise stated in the articles, and Section 1701.33, Revised Code of Ohio, gives directors alone the right to declare dividends.

transferred as from his ability to take advantage of the leverage offered by his voting rights.

To this same basic argument, the Court said in *Yeazel v. Coyle*, 68-1 U.S.T.C. ¶12,524:

"As pointed out by the Supreme Court in *Commissioner v. Estate of Holmes*, [46-1 USTC ¶10,245], 326 U.S. 480, 486 (1946), the words 'enjoyment' and 'enjoy', as used in these and similar statutes, are not terms of art, but connote substantial present economic benefit'. The Government's own regulations follow the same reasoning:

"The 'use, possession, right to the income, or other enjoyment of the transferred property' is considered as having been retained by or reserved to the decedent to the extent that the use, possession, right to the income, or other enjoyment is to be applied toward the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.'

Reg. §20.2036-1.

"It is apparent that the decedent retained no direct pecuniary benefit from the stock she placed in the trust.

\* \* \*

"The Government further argues that Mrs. Crawley retained an indirect economic or pecuniary benefit in the stock by reason of her combined role as individual shareholder and trustee, thereby giving her possession and enjoyment within the meaning of Section 2036 (a) (1).

\* \* \*

"If the Government's argument were carried to its logical conclusion, the donor of the stock in a closely held corporation would be required to divorce himself of all remaining interest in the corporation in order to make his gift effective for tax purposes. The sweep of Section 2036 (a) is not that broad."

It is submitted that the right to vote the stock under the facts of the *Byrum* case did not constitute retention

of "the possession or enjoyment of, or the right to the income from, the property," transferred within the meaning of Section 2036 (a) (1).

### CONCLUSION

The decision of the Court of Appeals is narrowly drawn to fit the unusual facts of this case. There is no evidence of differing views in the circuits and it is unlikely that the question decided will be a recurring one.

Petitioner fails to show that this is a case of great public concern and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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